BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through IX pertaining to credit union debt cancellation contracts and debt suspension agreements	))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On September 22, 2011, the Department of Administration published MAR Notice No. 2-59-459 pertaining to the public hearing on the proposed adoption of the above-stated rules at page 1842 of the 2011 Montana Administrative Register, Issue Number 18.

2. The department has adopted the following rules as proposed: New Rule IV (2.59.409), New Rule V (2.59.410), New Rule VI (2.59.411), and New Rule VIII (2.59.413).

3. The department has adopted the following proposed rules with changes, new material underlined, deleted material interlined:

NEW RULE I (2.59.406) DEFINITIONS (1) and (2) remain as proposed.

(3) "Debt cancellation contract" means a loan term or contractual arrangement modifying loan terms under which a credit union agrees, for a fee, to cancel all or part of a member's obligation to repay an extension of credit from that credit union upon the occurrence of a specified event. The agreement must specify the extension of credit to which it pertains. The agreement may be separate from or a part of other loan documents. A debt cancellation contract may be offered and purchased either contemporaneously with the other terms of the loan agreement or subsequently. The extension of credit to which it pertains may be a direct loan made by the credit union or an indirect loan in the form of a retail installment sales contract purchased by or assigned to the credit union. In the case of an indirect loan in the form of a retail installment sales contract, the debt cancellation contract may be offered by the credit union through a nonexclusive, unaffiliated agent contingent upon the credit union purchasing or taking assignment of the indirect loan.

(4) "Debt suspension agreement" means a loan term or contractual arrangement modifying loan terms under which a credit union agrees, for a fee, to suspend all or part of a member's obligation to repay an extension of credit from that credit union upon the occurrence of a specified event. The agreement must specify the extension of credit to which it pertains. The agreement may be separate from or a part of other loan documents. The term "debt suspension agreement" does not include loan payment deferral arrangements in which the triggering event is the member's unilateral election to defer repayment or the credit union's unilateral decision to allow a deferral of repayment. The extension of credit may be a direct loan made by the credit union or an indirect loan in the form of a retail installment sales contract purchased by or assigned to the credit union. In the case of an

indirect loan in the form of a retail installment sales contract, the debt suspension agreement may be offered by the credit union through a nonexclusive, unaffiliated agent contingent upon the credit union purchasing or taking assignment of the indirect loan.

(5) through (8) remain as proposed.

NEW RULE II (2.59.407) DEBT CANCELLATION AND DEBT SUSPENSION PROGRAMS – REQUIREMENTS

(1) through (1)(a)(iii) remain as proposed.

(b) obtain and maintain in effect~~,~~ insurance from an insurer authorized or otherwise registered with the State Auditor and Commissioner of Insurance (State Auditor) to do business in Montana~~.~~, except as provided in (2). The insurance must cover 100% of the at-risk loan balances to which the credit union's debt cancellation contracts pertain.

(2) An insurer authorized by the insurance regulator in an out-of-state bank's home state that has issued a policy to the out-of-state bank covering all of its debt cancellation contractual liabilities need not be authorized or otherwise registered with the State Auditor.

NEW RULE III (2.59.408) REQUIRED DISCLOSURES (1) A credit union shall provide the following disclosures to the credit union's member ~~at the time of offering the member a debt cancellation contract or debt suspension agreement~~:

(a) and (b) remain as proposed.

(c) ~~any~~ the refund policy ~~if the fee is paid in a single payment and added to the amount borrowed~~;

(d) through (g) remain as proposed.

(2) The requirements for the timing and method of disclosure are:

(a) the credit union shall make the disclosures in (1) and the short-form disclosures under ARM 2.59.413 orally at the time the credit union first solicits the purchase of a contract;

(b) the credit union shall make the long-form disclosures under ARM 2.59.413 in writing before the member completes the purchase of the contract. If the initial solicitation occurs in person, the credit union shall provide the long-form disclosure in writing at that time;

(c) if the contract is solicited by telephone, the credit union shall provide the disclosures in (1) and the short-form disclosures under ARM 2.59.413 orally and shall mail the long-form disclosures, and if appropriate, a copy of the contract, to the member within three business days beginning on the first business day after the telephone solicitation; and

(d) if the contract is solicited through written materials such as mail inserts or "take one" applications, the credit union may provide only the disclosures in (1) and the short-form disclosure under ARM 2.59.413 to the member within three business days beginning on the first business day after the member contacts the credit union in response to the solicitation, subject to the requirements of ARM 2.59.412(3)(b).

(3) The disclosures required by these rules must be conspicuous, simple, direct, readily understandable, and designed to call attention to the nature and significance of the information provided. The methods may include use of plain

language headings, easily readable typeface and size, wide margins and ample line spacing, boldface or italics for key words, and/or distinctive type style or graphic devices.

(4) The disclosures in the short-form disclosure under ARM 2.59.413 are required in advertisements and promotional material for contracts unless the advertisements and promotional materials are of a general nature describing or listing the services or products offered by the credit union.

(5) The disclosures described in these rules may be provided through electronic media in a manner consistent with the requirements of the Electronic Signatures in Global and National Commerce Act, 15 USC 7001 et seq. or the Uniform Electronic Transaction Act, Title 30, chapter 18, part 1, MCA.

NEW RULE VII (2.59.412) AFFIRMATIVE ELECTION TO PURCHASE AND ACKNOWLEDGMENT OF RECEIPT OF DISCLOSURES

(1) through (3)(b)(iii) remain as proposed.

(4) The affirmative election and acknowledgment may be made electronically in a manner consistent with the requirements of the Electronic Signatures in Global and National Commerce Act, 15 USC 7001 et seq. ~~and~~ or the Uniform Electronic Transaction Act, Title 30, chapter 18, part 1, MCA.

NEW RULE IX (2.59.414) GUARANTEED ASSET PROTECTION (GAP) FEATURE (1) A GAP waiver or agreement is a type of debt cancellation contract. A debt cancellation contract with a GAP feature offered in connection with an extension of credit for the purchase of titled personal property for personal, family, or household use is a single product ~~and does not require a separate agreement related to financing for the GAP feature~~. A credit union offering a debt cancellation contract with a GAP feature may do so through nonexclusive, unaffiliated agents such as automobile dealers. The fee arrangement between a credit union and a nonexclusive, unaffiliated agent through which the debt cancellation product is offered does not create a separate contract that violates the anti-tying provision of ARM 2.59.409(1)(a).

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: One commenter, a member association of credit unions, questioned whether it was necessary that NEW RULE VII(4) require compliance with both the Electronic Signatures in Global and National Commerce Act, 15 USC 7001 et seq. and the Uniform Electronic Transaction Act, Title 30, chapter 18, part 1, MCA, or whether compliance with either would be sufficient.

The commenter also requested that the debt cancellation rules governing banks (MAR Notice No. 2-59-452) and these companion rules governing credit unions (MAR Notice No.2-59-459) be adopted at the same time.

The commenter also expressed support for the comments submitted by Commenter #2 and Commenter #3.

RESPONSE #1: The department does not believe that compliance with both state and federal laws governing electronic signatures and electronic transactions is necessary for purposes relating to the sale and purchase of debt cancellation contracts and debt suspension agreements. Accordingly, the department changed "and" to "or" in NEW RULE VII(4). The department's intent was to authorize and facilitate electronic transactions, not to create burdensome redundancy.

The department intends to publish the notices of adoption for the bank debt cancellation rules (MAR 2-59-452) and for these credit union debt cancellation rules (MAR 2-59-459) at the same time so that neither type of institution gains an unfair competitive advantage over the other.

COMMENT #2: The commenter is an administrator of debt cancellation programs and assists in the development of debt cancellation products offered through regional and community credit unions as part of the credit unions' direct and indirect lending programs. The commenter recommended that:

1) the rules clarify that debt cancellation products may be offered by a credit union in conjunction with its direct lending program and by a credit union acting through a nonexclusive, unaffiliated agent in conjunction with the credit union's indirect lending program;

2) the department delay mandatory compliance by credits unions with certain rules governing the offer of debt cancellation contracts and debt suspension agreements in the credit unions' indirect lending programs only. The basis for the recommendation was that indirect lending presents unique problems relating to the distribution channel involved in indirect lending where debt protection products are offered by the credit unions through nonexclusive, unaffiliated agents whose installment sales contracts are purchased by or assigned to the credit unions. The rules with which delayed mandatory compliance was requested were: the periodic payment option requirement under NEW RULE VI; the refund option requirement under NEW RULE V; the requirement under NEW RULE VIII that an adapted long-form disclosure modeled on 12 CFR 37 Appendix B be provided to the borrower and that the second, third, and fifth disclosures in an adapted short-form disclosure modeled on 12 CFR 37 Appendix A be provided to the borrower; and the requirement in NEW RULE VII for obtaining a member's written acknowledgment of receipt of disclosures;

3) in the indirect lending context, the only disclosures required under NEW RULE III be the optional nature of the product; the refund policy; and the eligibility requirements, conditions, and exclusions;

4) NEW RULE III more closely mirror the Office of the Comptroller of the Currency (OCC)'s requirements in 12 CFR 37.6; and

5) the department clarify NEW RULE IX to reflect that a GAP waiver/agreement is a type of debt cancellation product, that a GAP waiver or any other debt cancellation product offered by a credit union through a nonexclusive unaffiliated agent is a single product, and the financing arrangement between the credit union and the agent does not create a separate product that violates the anti-tying prohibition under NEW RULE IV.

RESPONSE #2: The department thanks the commenter for its comment.

Consistent with the definition of a loan or extension of credit in NEW RULE I, the definitions of "debt cancellation contract" and "debt suspension agreement" have been amended to clarify that those products may be offered by credit unions in conjunction with both their direct lending and their indirect lending programs. In the latter instance, credit unions may offer the products through nonexclusive, unaffiliated agents such as automobile dealers or other sellers whose installment sales contracts the credit union acquires on the indirect lending market.

The department declines to delay mandatory compliance with any of the rules when the debt cancellation product is offered in conjunction with the credit union's indirect lending program. It is the credit union that offers the debt cancellation product in both the direct and indirect lending contexts. The department does not believe that the unique challenges posed by the distribution channel in the indirect lending context justify delaying compliance with the consumer protections afforded by the rules. In both the direct and indirect lending contexts, it is the credit union rather than the nonexclusive, unaffiliated agent that is offering the product. The consumer protections should not vary depending on whether the offer is conveyed by the credit union or through an agent. Credit unions may choose to delay offering debt cancellation products in conjunction with their indirect lending programs until they are prepared to fully comply with all of the rules.

The department has amended NEW RULE III to more closely mirror 12 CFR 37.6 as requested by this commenter, by commenter #3, and others in the companion rulemaking related to debt cancellation products offered by banks (MAR 2-59-452).

The department agrees with the commenter and has amended NEW RULE IX to clarify ambiguities in the rule, i.e., that a GAP waiver is a type of debt cancellation product and that the financing arrangement between a credit union and a nonexclusive, unaffiliated agent through whom the product is offered does not create a separate product that violates the anti-tying prohibition under NEW RULE IV.

COMMENT #3: The commenter is a national trade association of insurance companies and other financial service providers selling or servicing credit protection products. The commenter states that its members administer approximately 85% of the debt cancellation programs in the United States. It offered the following comments:

In order for there to be parity between state-chartered and federally chartered credit unions, the department's rules should not vary from the OCC's regulation at 12 CFR Part 37 governing offers/sales of debt protection products by national banks. Consistency between the sets of rules will enable the department to rely on OCC precedent in interpreting and enforcing the rules.

New Rule III should more closely mirror the disclosure requirements under 12 CFR 37.6.

The department should clarify that debt protection products may be offered by credit unions in conjunction with their direct lending as well as their indirect lending programs.

An insurer authorized by the insurance regulator in an out-of-state credit union's home state that has issued a contractual liability or other policy to that credit union covering its at-risk loan balances associated with the credit union's debt

cancellation contracts, should not have to be authorized by the State Auditor and Commissioner of Insurance (State Auditor) to do business in Montana as required under NEW RULE II(1)(b). In addition, if a credit union is large enough to assess its risk reserve for it, the department should allow the credit union to do so in lieu of obtaining insurance.

The department should indefinitely delay mandatory compliance by credit unions with certain rules in conjunction with their indirect lending programs as did the OCC respecting national banks' indirect lending programs. The applicable rules for which delayed compliance is sought are listed in Comment #2.

RESPONSE #3: The department thanks the commenter for its comment and responds to each comment as follows:

HB 432 mandated that the department adopt rules that are substantially equivalent to or more stringent than rules and guidance relating to debt cancellation contracts and debt suspension agreements offered by federal credit unions. The National Credit Union Administration has referred federal credit unions to 12 CFR Part 37 for guidance as to best practices. The department's rules are substantially equivalent to or slightly more stringent than the OCC's rules and the department believes its rules create substantial parity between federal credit unions and state-chartered credit unions relating to offers and sales of debt cancellation contracts and debt suspension agreements. The substantial equivalency will allow the department to rely on OCC precedents interpreting and enforcing 12 CFR Part 37. The department believes that the Montana-specific disclosures required under NEW RULE III(1)(a) and (1)(g) that have no equivalent or counterpart under 12 CFR Part 37 provide additional consumer protection are not onerous, and that they will not appreciably lengthen either the model short-form and long-form disclosures under NEW RULE VIII. The department believes that purchasers of debt protection products who are aware of all of the prohibitions in NEW RULE IV are in a better position to assert the protections that those prohibitions afford. The department sees no reason why some, but not all, of the prohibitions in NEW RULE IV should be disclosed.

The department has amended NEW RULE III to more closely mirror 12 CFR 37.6 as requested by this commenter and other commenters in MAR 2-59-452, which is the department's companion rulemaking applicable to banks that offer debt cancellation contracts and debt suspension agreements to their customers in conjunction with loans or extensions of credit. The department prefers to keep the rules governing credit unions and the rules governing banks relating to the same topic substantially similar for the purpose of parity between state-chartered banks and state-chartered credit unions.

The department has amended the definitions of debt cancellation contract and debt suspension agreement in NEW RULE I to clarify that such products may be offered in conjunction with the credit unions' direct lending and indirect lending programs, consistent with the definition of "loan" or "extension of credit" in the same rule.

The department agrees that if an authorized insurer in an out-of-state credit union's home state has issued an insurance policy to the credit union covering the at-risk loan balances under the credit union's debt cancellation contracts, the insurer

need not become authorized by the State Auditor in order for the out-of-state credit union to offer a debt cancellation product to its Montana members in conjunction with loans or extensions of credit. The policy holder in that circumstance is the out-of-state credit union, not the Montana members. Therefore, the insurer need not be authorized by the State Auditor. The department consulted with the office of the State Auditor concerning the issue and amended NEW RULE II consistent with the commenter's comment and the State Auditor's concurrence that the insurer would not need to be an authorized insurer in Montana in the circumstance described.

The department declines to allow credit unions to post reserves in lieu of maintaining insurance covering the at-risk loan balances associated with their debt cancellation contracts. The department believes that best practice, consistent with credit union safety and soundness principles, is to require insurance coverage. Most state-chartered credit unions in Montana are not large and, to the department's knowledge, none have actuaries on staff. No state-chartered credit union commented that it wanted the option of posting reserves in lieu of maintaining insurance. In addition, if no insurance was required, safety and soundness examinations of credit unions would take longer and would require that the department obtain specialized training for its examiners who are already taxed with a heavy workload. In the department's opinion, those circumstances dictate against allowing the posting of reserves in lieu of maintaining insurance.

The department declines to delay mandatory compliance by state-chartered credit unions with the debt cancellation and debt suspension rules in the context of the credit union's indirect lending program for the reasons given by the department in response to the same issue raised in Comment #2. The alternative to the department's decision not to delay mandatory compliance by credit unions with certain rules in the indirect lending context would have been to delay allowing credit unions to offer debt cancellation products in the indirect lending market at all. The department believes that not allowing credit unions to offer debt cancellation products through nonexclusive, unaffiliated agents in the indirect lending market at this time would create less parity between state-chartered credit unions and federal credit unions than requiring state-chartered credit unions to comply with all rules in conjunction with both their direct and indirect lending programs. The department believes that since a credit union is authorized to offer a debt protection product through a nonexclusive, unaffiliated agent in the indirect lending market, it is not unreasonable to expect it to ensure that the agent delivers the appropriate disclosures and obtains the appropriate acknowledgement of receipt. The department believes that NEW RULE VII, which provides some leeway where a credit union has made its best efforts and maintained sufficient documentation of having delivered the mandatory disclosures, adequately addresses the commenter's concerns.

By: /s/ Janet R. Kelly
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